

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1762

September Term, 2014

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CLARKSVILLE RESIDENTS AGAINST  
MORTUARY DEFENSE FUND, INC., ET AL.

v.

DONALDSON PROPERTIES, ET AL.

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Wright,  
Kehoe,  
Kenney, James A., III  
(Retired, Specially Assigned),

JJ.

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Opinion by Kenney, J.

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Filed: July 20, 2016

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

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Appellant, Clarksville Residents Against Mortuary Defense Fund, Inc., (“Clarksville”), appeals the appellee Howard County Board of Appeals’s (“the Board’s”) approval of appellee Donaldson Properties’s (“Donaldson’s”), application for a conditional use<sup>1</sup> to build a funeral home and mortuary within a rural residential density exchange option zoning district (“RR-DEO”).<sup>2</sup>

Clarksville presents three questions for our review,<sup>3</sup> which we have consolidated and reordered as follows:

1. Did Donaldson’s application for a conditional use satisfy the requirements of the Howard County Zoning Regulations?

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<sup>1</sup> The terms “conditional use” and “special exception” are used interchangeably in the various ordinances to describe uses that can be permitted in a zoning district subject to certain conditions. *See People’s Counsel for Balt. Cnty. v. Loyola Coll. in Md.*, 406 Md. 54, 71 n.19 (2008) (citation omitted) (“The terms ‘special exception’ and ‘conditional use’ are essentially interchangeable.”).

<sup>2</sup> The Density Exchange Option Overlay District section of the Howard County Zoning Regulations (“HCZR”) Section 106.A provides:

The DEO Overlay District is established to provide land owners in the RC and RR Districts with opportunity and incentive to preserve significant blocks of farmland in the rural area of the county. This district is also intended to encourage the clustering of residential development in areas where the development will not have an adverse impact on farm operations. To accomplish this, the DEO District allows residential density in the RC and RR Districts to be exchanged between parcels. Density exchanges in the District should result in large parcels being preserved in perpetuity, while residential development is directed toward parcels which are able to absorb the additional dwellings.

<sup>3</sup> In its brief, Clarksville presents the issues as follows:

1. Does the Board's approval satisfy the “adverse effects” test of the Zoning Regulations and *Schultz v. Pritts*?
2. Does the Board's approval satisfy the requirements of the Zoning Regulations respecting the General Plan?
3. Does the Board's approval satisfy all other applicable requirements of the Zoning Regulations?

2. Did the proposed conditional use in this location satisfy the “adverse effects” test of *Schultz v. Pritts* and the Howard County Zoning Regulations?

For the reasons that follow, we affirm the judgment of the circuit court.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In December 2009, Donaldson filed a conditional use application for a funeral home and mortuary on a 3.207 acre parcel located at 12540 Clarksville Pike on the west side of Route 108, approximately 1,600 feet south of Route 32, in Clarksville (“the Property”). The Property, generally speaking, is bordered by St. Louis Church on the north, Christ Evangelical Lutheran Church of Columbia on the south, with several single-family detached homes on parcels further south; Route 108 on the east; and a 42.44 non-buildable preservation parcel set aside for reforestation on the west, and several lots improved with single-family detached dwellings further west.<sup>4</sup> There is an 86 acre farm and single-family dwelling across Route 108.

The final version of the funeral home and mortuary structure proposed by Donaldson is approximately 135 feet in length (from east to west), 70 feet in width (from north to south), and 32.5 feet high, totaling approximately 17,000 square feet. It is to be built in the southeastern section of the Property, approximately 125 feet from the Route 108 right-of-way and 30 feet from the south lot line. The facility will be accessible to and from Route 108 through one marked ingress lane and two separate right and left turn

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<sup>4</sup> The Preserves at Clarksville, the community located to the west of the non-buildable preservation parcel, is located approximately a quarter mile from the Property, and the development to the south, Clarksville Overlook, approximately one half a mile away. Some witnesses opposing the application live in those developments.

egress lanes. The interior driveway runs along the north side of the funeral home and there are 98 parking spaces.

Between the date of Donaldson’s original petition in 2009 and the Hearing Examiner’s decision, the Department of Planning and Zoning (“DPZ”), as required by the Howard County Code,<sup>5</sup> transmitted its Technical Staff Report (“TSR”) with findings and recommendations to the Hearing Examiner on March 29, 2010, recommending approval of Donaldson’s request. When the Hearing Examiner, on November 29, 2010, issued a Decision and Order denying the petition, Donaldson modified its petition by, among other changes, reducing the size of the structure and adding additional parking spaces, and appealed to the Board.

The Board conducted a de novo hearing to consider the revised petition over twenty-two nights from February 28, 2012 to April 30, 2013. During that time, the original petition was amended twice, and two addendums to the original TSR were submitted to the Board as evidence.<sup>6</sup> The second addendum stated:

The number of required parking spaces in this case is for one space per 50 square feet of floor area in public rooms (this criterion exceeds the alternate criterion for 10 spaces per viewing room). Public rooms are defined (Section 133.D.7.b) as comprising chapel, reception rooms,

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<sup>5</sup> Howard County Department of Planning and Zoning (“DPZ”) ordinances, Section 16.801.

<sup>6</sup> The first addendum to the TSR was dated February 1, 2012, and was issued following Donaldson’s submission of a Revised Conditional Use Plan due to a change in the parking space requirements for funeral homes and mortuaries in the HCZR. The second addendum to the TSR was dated September 24, 2012, and was issued following the submission of a Second Revised Plan that expanded a stream buffer in the western rear portion of the Property. Both addenda recommended approval.

visitation rooms, and any flexible space adjacent to these rooms that can be used as overflow when necessary.

As noted in the February, 2012 Addendum, a required floor plan of the proposed facility was submitted with the Revised Plan. This floor plan depicts 4,876 square feet of floor area in public rooms and a requirement for 98 parking spaces based on this square footage.

The Department of Planning and Zoning concurred with the petitioner's floor plan depiction of public room square footage utilized as the basis for the parking calculation and the resulting requirement for 98 parking spaces. The Second Revised Plan proposes no changes to this floor plan and depicts 98 parking spaces; therefore, the Second Revised Plan complies with the Section 131.B.4 parking requirement.

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According to the Buildable Envelope Area tabulation, the building envelope comprises 64,159 square feet. On this basis, green space comprising 12,832 square feet (20 percent) of the building envelope is required and 14,329 square feet (22.33 percent) is provided. . . .

The Second Revised Plan depicts the western boundary of the building envelope as being formed by the 50 foot setback from the property line. The term "building envelope" is not defined in the Zoning Regulations; Section 131.N.22.e uses specific language directing that the building envelope is formed by the required structure setbacks from property lines and public street rights-of-way which differs from the defined term "building restriction line." It seems reasonable that if the intent of the Zoning Regulations was to utilize the defined term "building restriction line" as the basis for the green space calculation, this existing terminology would have been used.

While it may be considered counterintuitive to include within a building envelope space which cannot be built upon, given that the purpose of identifying the building envelope is to serve as a basis for calculating a percentage of green space and not for the purpose of placing structures in an unbuildable area, counting the stream buffer as green space is consistent with the concept that this area *is* a permeable portion of the site.

The Department of Planning and Zoning accepts the Petitioner's basis for calculating the green space percentage. The Second Revised Plan complies with the green space requirement.

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Other issues raised by citizens . . . must be addressed at the Site Development Plan stage. It is anticipated that these requirements can be met with the proposed plan, but it is possible that some reduction or modification to the building could be required.

Also considered by the Board were the following:

the Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, various technical staff reports and agency comments, the recommendation of approval of the Department of Planning and Zoning (“DPZ”) in its Technical Staff Report (“TSR”) dated March 17, 2010, . . . the General Plan for Howard County, the General Plan of Highways, the revised or amended conditional use plan[s] dated September 7, 2011, [January 10, 2012, and August 23, 2012; and witness testimony].

The most contested issues involved the adequacy of “green space,” the number of parking spaces, the width of the stream buffer,<sup>7</sup> and the adverse effects generated by the cultural aversion of Asians living in the area to a funeral home.

On July 3, 2013, the Board, finding that the proposed use met all of the conditional use criteria, issued a Decision and Order granting the petition and “**ORDERED:**”

That the Petition of Donaldson Funeral Home for a Conditional Use for a Funeral Home and Mortuary in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District, is hereby **GRANTED**, subject to the following conditions:

1. The conditional use shall apply only to the proposed funeral home and mortuary as described in the petition and as depicted on the Amended Conditional Use Plan dated August 15, 2012 and not to any other activities, uses or structures on the Property.
2. The Petitioner shall utilize a double-walled holding tank for embalming fluid wastewater with double walled pipes and leak sensors for the system.
3. The Petitioner shall construct (a) a deceleration lane at least 250 feet long for vehicles entering the property from southbound Maryland Route 108; (b) an acceleration lane for vehicles exiting the Property in the southbound direction; and (c) an appropriate left turn bypass lane for

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<sup>7</sup> A tributary to a Tier II stream in the Carroll’s Branch watershed meanders along the rear western portion of the Property.

northbound Maryland Route 108 in the vicinity of the proposed access point for the Property.

4. The Property shall not be used as a crematorium without subsequent conditional use approval.
5. The Petitioner shall comply with all applicable Federal, State, and County laws and regulations.

On August 2, 2013, Clarksville filed a Petition for Judicial Review in the Howard County Circuit Court. The circuit court heard arguments on March 14, 2014, and on September 15, 2014, issued an Order affirming the Board along with a Memorandum Opinion explaining its decision. Appellant filed this timely appeal on October 15, 2014.

## DISCUSSION

### Standard of Review

“On appellate review of the decision of an administrative agency, this Court reviews the agency’s decision, not the circuit court’s decision.” *Long Green Valley Ass’n v. Prigel Family Creamery*, 206 Md. App. 264, 273 (2012) (quoting *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248 (2008)). In our review, we “determine whether the agency’s decision is in accordance with the law or whether it is arbitrary, illegal, and capricious.” *Prigel Family Creamery*, 206 Md. App. at 274 (quoting *Md. Dep’t of the Env’t v. Ives*, 136 Md. App. 581, 585 (2001)). “[I]f the issue before the administrative body is ‘fairly debatable’, . . . the courts will not substitute their judgment for that of the administrative body.” *Tabassi v. Carroll Cnty. Dep’t of Soc. Servs.*, 182 Md. App. 80, 86 (2008) (quoting *Eger v. Stone*, 253 Md. 533, 542 (1969)). In other words, we “defer to the conclusions of the zoning body where the evidence makes the question of harm or

disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable.” *People’s Counsel for Balt. Cnty. v. Loyola Coll. in Md.*, 406 Md. 54, 101 (2008) (citations omitted) (internal quotation marks omitted).

In conducting our analysis, “[w]e review local laws and ordinances under the same principles that govern our construction of State statutes.” *F.D.R. Srouer P’ship v. Montgomery Cnty.*, 179 Md. App. 109, 122 (2008), *aff’d*, 407 Md. 233 (2009). If the issue is one of ordinance or regulatory construction, *see 120 W. Fayette St., LLLP v. Mayor & City Council of Balt. City*, 413 Md. 309, 331 (2010) (“We construe local ordinances and charters under the same canons of statutory construction as we apply to statutes.”), the starting point is the plain language of the provision. If the regulatory language is “clear and unambiguous, we ordinarily ‘need not look beyond [its] provisions and our analysis ends.’” *Opert v. Criminal Injuries Comp. Bd.*, 403 Md. 587, 593 (2008) (alteration added) (quoting *Barbre v. Pope*, 402 Md. 157, 173 (2007)). Nevertheless, “[t]he meaning of the plainest language is controlled by the context in which it appears.” *Kaczorowski v. Mayor & City Council of Balt.*, 309 Md. 505, 514 (1987) (citation omitted) (internal quotation marks omitted).

When two provisions appear to be at odds, we may turn to the “often repeated principle that a specific statutory provision governs over a general one.” *Lumbermen’s Mut. Cas. Co. v. Ins. Comm’r*, 302 Md. 248, 268 (1985). And, “even when the language of a statute is free from ambiguity, in the interest of completeness we may, and sometimes do, explore the legislative history of the statute under review.” *Mayor & City*

*Council of Balt. v. Chase*, 360 Md. 121, 131 (2000) (citation omitted) (internal quotation marks omitted).

### **A General Overview**

The Zoning Regulations of Howard County (“HCZR”) permit conditional uses “in specified zoning districts based on the presumption that they are generally appropriate and compatible in the specified districts.” HCZR § 131.A. General standards to which applicants for a condition use must abide include the following:

1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.
2. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site are such that the overall intensity and scale of the use(s) are appropriate for the site.
3. The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the proposed use under this standard, the Hearing Authority shall consider whether or not:
  - a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.
  - b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.
  - c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

- d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.
- e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

HCZR § 131.B.<sup>8</sup>

The regulations also provide standards or requirements specific to the types of conditional uses. For Funeral Homes and Mortuaries the regulations provide:

A Conditional Use may be granted in the RC, RR,<sup>[9]</sup> R-ED or R-20 Districts for funeral homes or mortuaries provided that:

- a. The area of the lot shall be not less than three acres.
- b. The site has frontage on and direct access to a collector or arterial highway designated in the General Plan.
- c. The design of new structures or additions to existing structures will be compatible in scale and character with residential development in the vicinity, as demonstrated by architectural elevations or renderings submitted with the petition.
- d. Buildings, parking areas and outdoor activity areas will be at least 50 feet from adjoining residentially-zoned properties other than public road

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<sup>8</sup> In their briefs, the parties cite Section 131.B.2. as the section of the HCZR that includes the various considerations to be weighed by the Board in determining whether a proposed development will have “adverse effects” that are “beyond those ordinarily associated” with the proposed use. In the current version of the HCZR those considerations appear in Section 131.B.3., and, according to the revision chart accompanying the HCZR that lists all amendments to the HCZR, there were no changes from the time that the amended petition was submitted to DPZ until the present. For consistency, we will use the citations as they appear in the briefs.

<sup>9</sup> The RR district includes the RR-DEO overlay district. *See* HCZR § 106.0.A. (“The DEO Overlay District is established to provide land owners in the RC and RR Districts with opportunity and incentive to preserve significant blocks of farmland in the rural area of the county.”).

right-of-ways. The Hearing Authority may reduce this setback to no less than 20 feet or the minimum setback required by the zoning district, whichever is greater, if:

- (1) The adjoining land is committed to a long term institutional or open space use that provides an equivalent or better buffer for vicinal residential development or;
  - (2) The petition includes detailed plans for screening, consisting of a combination of a solid fence or wall and landscaping, or an equivalent combination, that presents an attractive and effective buffer for neighboring properties.
- e. At least 20% of the area within the building envelope shall be green space, not used for buildings, parking area or driveways. The building envelope is formed by the required structure setbacks from property lines and public street rights-of-way.

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[Minimum Parking Requirements for] Funeral homes[:] 10.0 spaces per public viewing room, or 1 space per 50 square feet of floor area in public rooms (chapel, reception rooms, visitation rooms, and any flexible space adjacent to these rooms that can be used as overflow when necessary), whichever is greater, based upon a required floor plan of the proposed facility submitted with a Conditional Use petition or a Site Development Plan.

The conditional use applicant has the burden of proof, which is “by a preponderance of the evidence.” HCZR § 131.G. Any person aggrieved or affected by a Hearing Examiner’s decision may appeal to the Board. HCZR § 130.A.3. In addition, a petition for judicial review of the Board’s decision may be filed in the circuit court. *See* Md. Rule 7-201(a).

Several standards or requirements for approval of this particular use are not in dispute. They include the size of the lot, the sufficiency of setbacks from other properties, and the Property’s frontage on—and direct access to—a collector highway (Route 108). Clarksville, however, takes issue with several aspects of the Board’s decision including whether the Board of Appeals applied the applicable zoning regulations and the proper

burdens of proof and persuasion. More specifically, Clarksville contends that the green space, parking, environmental, cultural, and “adverse effects” requirements were not met.

In Donaldson’s view, “[Clarksville] seek[s] to impugn the Board’s D & O by impartially touting the strength of their case vis-à-vis the case presented by Donaldson” without mentioning “the substantial evidence upon which the [Board] based its approval.” In the Board’s view, its decision to “grant[] the petition of Donaldson funeral home for a conditional use . . . was supported by substantial evidence.” We will discuss the specific contentions in further detail.

The Applicable Zoning Regulations: Section 130.C or Section 131.A?

*The Provisions at Issue*

HCZR Section 130.C. provides:

Where in these Regulations certain powers are conferred upon the Hearing Authority,<sup>[10]</sup> or the Hearing Authority is called upon to decide certain issues, such Hearing Authority shall examine the specific property involved and the immediate neighborhood. The application shall not be approved where the Hearing Authority finds that the proposed structure, addition, extension of structure or use, use or change of use, would menace the public health, safety, security, or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood. In deciding such matters, the Hearing Authority shall give consideration, among other things, to the following:

1. The number of people residing, working or studying in the immediate areas.

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<sup>10</sup> Section 130.A.2. of the HCZR defines Hearing Authority to include the Board: Section 16.302 of the Howard County Code authorizes the Hearing Examiner to hear and decide certain matters within the scope of these Regulations. The Howard County Code specifies which matters are within the jurisdiction of the Hearing Examiner. The term “Hearing Authority” is used in these Regulations to refer to both the Board of Appeals and the Hearing Examiner.

2. Traffic conditions including facilities for pedestrians, such as sidewalks and safety zones and parking facilities and the access of cars to highways.
3. The orderly growth of the community.
4. The reasonable needs of the entire community and particular neighborhoods.
5. The legislative intent of these Regulations as provided in Section 100.0.A.
6. The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.
7. Facilities for sewers, water supply, solid waste collection and disposal and the ability of the County to supply such services.
8. Availability of fire-fighting equipment.
9. Decisions of the Circuit Court for Howard County and the Court of Appeals of Maryland.
10. The effect of such use upon the peaceful enjoyment of people in their homes.
11. The most appropriate use of land and structures.
12. The type and kind of structures in the vicinity where people are apt to gather in large numbers such as schools, churches, theaters, hospitals and the like.
13. The General Plan for Howard County including master plans for land use, highways, recreation and parks, schools, sewers, water, conservation and the like.
14. The effect of the proposed use or development on the natural, environmental or landscape resources of the site and adjacent sites, including such resources or features as historic resources, floodplains, wetlands, steep slopes and vegetation.

The relevant portion of Section 131.A. provides:

A. Statement of Legislative Intent

Conditional Uses are authorized in specified zoning districts based on the presumption that they are generally appropriate and compatible in the specified districts. However, particular uses in particular locations may have characteristics or impacts that are not typical. Conditional Uses are not permitted automatically, but are subject to the regulations of *this section* and the conditions imposed by the Hearing Authority upon its approval of the proposed Conditional Use.

Emphasis added.

*Contentions on Appeal*

Clarksville asserts that “the Board fail[ed] to conduct most of the[] required considerations [in Section 130.C.],” and therefore, the Board’s approval is “legally insufficient and subject to reversal by this Court.” Donaldson responds that “[c]onditional use petitions, to be heard and decided by the [Board] pursuant to Sec. 131 of the HCZR, are not one of the ‘certain’ issues for which HCZR Sec. 130.C applies.” Due to the statutory rule of construction that the specific prevails over the general, “HCZR 130.C. is inapplicable and Appellants arguments to the same are moot.” The Board did not specifically address this particular argument in its brief.

*Analysis*

Section 130.C. is a provision that relates generally to “public health, safety, security, or general welfare” considerations involving a broad range of zoning concerns including a “structure, addition, extension of structure or use, use or change of use.” Section 131.A., on the other hand, expressly and specifically relates to conditional use approvals and states that “Conditional Uses are not permitted automatically, but are subject to the regulations of *this section* . . . .” (Emphasis added). Section 131 provides both general criteria for conditional use approval, as well as, criteria specific to each type of conditional use. HCZR §§ 131.B., 131.N. Because Section 131 is a more specific provision, the canons of statutory interpretation persuade us that it, and not Section 130.A., governs conditional use applications, and the Board was not required to address

the factors listed in that section in addition to the considerations provided for in Section 131. See *Lumbermen’s Mut. Cas. Co.*, 302 Md. at 268.

The legislative history supports this conclusion. The first version of the HCZR, enacted in 1948, stated that certain uses were subject to “limitations, guides, and standards,” similar to the current section 130.C. provisions. By 1961, the regulations had separated uses requiring special use approval into a different section, but again required the Board to consider certain “limitations, guides, and standards” similar to the current 130.C. provisions. In 1971, the special use or conditional use regulations eliminated the express “limitations, guides, and standards” language for such uses and provided instead that such uses “were not permitted automatically, but are subject to the regulations of this section . . . .”<sup>11</sup> In our view, this restructuring indicates a legislative intent to treat conditional uses separately from the general provisions now found in Section 130.C. This is consistent with the nature of conditional uses in that many of the general considerations in Section 130.C. have been factored into the determination that such uses are “generally appropriate and compatible in the specified district[.]”

#### Section 131.G. – Preponderance of the Evidence

Section 131.G. of the HCZR discusses the burdens of production and persuasion for applicants in conditional use cases:

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<sup>11</sup> The corresponding section of the current HCZR, Section 131.A. states, in relevant part, “Conditional Uses are not permitted automatically, but are subject to the regulations of this section . . . .”

The applicant for a Conditional Use shall have the burden of proof, which shall be by a preponderance of the evidence and which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Hearing Authority or are required to meet any provisions of these Regulations.

*Contentions on Appeal*

Clarksville contends that the “Board’s Decision and Order does not display any consistent standard of evidence or burden of proof.” In its view, the “only consistency in the Decision and Order is the Board’s failure to apply the statutory, ‘preponderance of the evidence’ standard of Section 131.G.,” which, “makes the Board’s Decision and Order legally insufficient and reversible in its entirety.”

Donaldson responds that this “issue was never presented to the Circuit Court on appeal,” and “by failing to raise this issue before the Circuit Court, [Clarksville] ha[s] waived the issue on appeal . . . .” And, according to Donaldson, even if this argument is preserved for our review, the Board’s “Decision and Order clearly states that ‘[t]he case was conducted in accordance with Section 2.209 of the Board’s Rules of Procedure’ [and] . . . clearly sets forth [that] the burden of proof [is] ‘one of a preponderance of the evidence and is on the Petitioner to show, by competent, material and substantial evidence, that he or she is entitled to the relief requested and that the request meets all prescribed standards and requirements.’” The Board did not specifically address this particular argument in its brief.

Clarksville replies that “[t]he Board’s failure to apply the correct evidentiary standard for a Conditional Use was raised and discussed before the Circuit Court below”

when counsel stated that the Hearing Examiner “used the preponderance of the evidence standard . . . contrary to what we’re alleging the Board did in their perfunctory decision.”

*Analysis*

We are persuaded that Clarksville adequately preserved its “preponderance of the evidence” argument, but we are not persuaded that the Board failed to apply the proper evidentiary standard. We explain.

The Board stated in its Decision and Order that the “case was conducted in accordance with Section 2.209 of the Board’s Rules of Procedure,” which requires the petitioner to satisfy the burden of production and persuasion “by a preponderance of the evidence.” The persuasiveness of evidence is judged not on quantity or volume, but by the weight assigned to it by the Board. It is well settled that a petitioner in a zoning case has satisfied the burden of persuasion by a preponderance of the evidence when “there [i]s substantial evidence to support the Board’s finding.” *Clark v. Cnty. Bd. of Appeals for Montgomery Cnty.*, 235 Md. 320, 323 (1964). Substantial evidence exists when “reasoning minds could reasonably reach [the Board’s] conclusion from facts in the record.” *Cremins v. Cnty. Comm’rs of Wash. Cnty.*, 164 Md. App. 426, 438 (2005) (quoting *Stansbury v. Jones*, 372 Md. 172, 182–83 (2002)).

As indicated above, the Board considered Donaldson’s conditional use petition over twenty-two separate hearing days. The Board heard testimony from more than thirty-five witnesses and accepted more than one hundred documents into evidence. Among that evidence was the testimony of Donaldson’s expert witnesses John Gary

(architect), Robert Vogel (professional engineer), Mickey Cornelius (traffic engineer), Mark Eisner (hydrogeologist), Robert Golden (toxicological researcher), and Jennifer Yocum (feng shui<sup>12</sup> consultant), whom the Board clearly found more persuasive than experts and lay witnesses provided by Clarksville. For example, the Board rejected Clarksville expert professional engineer Zach Fisch’s contentions regarding a different green space calculation, noting “that DPZ agreed with Mr. Vogel’s use of the definition of ‘building envelope’ as provided in Section 131.N.22.e of the Zoning Regulations.” Ultimately, it concluded that “[m]uch of the testimony presented by [Clarksville] amounted only to unsupported opinions and conclusions.” We will discuss the evidence as it pertains to alleged instances of non-compliance in more detail below.

Harmony with the General Plan

*The Board’s Related Findings of Fact*

[Professional engineer Robert] Vogel . . . stated that the [conditional use] Plan is consistent with the General Plan given that legislation had recently been proposed to remove the funeral home conditional use from the RR-DEO zone, but DPZ and the Howard County Planning Board recommended against its enactment. According to Mr. Vogel, this action by County planning agencies affirmed that funeral homes are important in the RR-DEO zone.

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[Professional Engineer Zachary] Fisch . . . believed that wetlands or a wetland buffer, which were not depicted on the Plan, might extend onto the Property.

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<sup>12</sup> During her direct examination at the April 4, 2013 hearing, Ms. Yocum defined feng shui as follows: “Feng shui, it means wind water. But it’s a principle that was developed thousands of years ago in China and it’s basically about the energy of our homes and our environments and how those things impact us.”

Shun Lu testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition. Ms. Lu testified that persons of Asian descent have a cultural sensitivity to funeral homes and that she believed it to be bad luck to live close to a funeral home.

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Peter Li, a professional geologist, testified that he is a resident of Highland, Maryland, and that he is opposed to the Petition. . . . Dr. Li further stated that he believed that the Funeral Home could generate adverse impacts to groundwater due to the geology of the area. Dr. Li also testified that funeral homes are not compatible with nearby residences from a feng shui perspective.

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Marianne Lee testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition. Ms. Lee testified that persons of Asian descent have a cultural sensitivity to funeral homes.

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Anthony Redman, a professional land planner, testified that he believed the Property to be too small for the proposed use. Mr. Redman stated that he believed that MDE could require a 150 foot buffer from the stream tributary running along the west side of the Property instead of the 100 foot buffer shown on the Plan. Mr. Redman testified that the stream is a Tier II stream.

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Tiru Liang testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition. . . . Ms. [Liang] stated that she was also concerned with the potential environmental impacts of the Funeral Home.

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Richard Klein, a professional environmental consultant, testified that he believed the Property might not be able to satisfy environmental site design standards.

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Veronika Carella testified that she is a resident of Glenwood, Maryland, and that she is opposed to the petition. Ms. Carella Testified that she had concerns regarding the potential environmental impacts of the Funeral Home.

\* \* \* \*

On rebuttal, Mr. Vogel . . . stated that he visited the Property and that no wetlands or wetlands buffers existed on the Property. Regarding potential impacts to the Tier II stream, Mr. Vogel testified that the purpose of the 100 foot buffer was to protect the stream. So long as [Donaldson] complied with the imposed buffer, according to Mr. Vogel, the stream

would not be adversely impacted. . . . Finally, Mr. Vogel testified that persons of Asian descent moved into new homes located in close proximity to two existing funeral homes on Old Columbia Pike in Ellicott City.

\* \* \* \*

On rebuttal, Mark Burchick, an environmental consultant, testified that the stream buffer would be 100 feet from the unnamed tributary located at the northwest corner of the Property. Burchick stated that even if a temporary encroachment was necessary during the site development process, MDE would be unlikely to impose a greater buffer from the stream tributary. Mr. Burchick testified that the 100 foot stream buffer shown on the plan would be sufficient to prevent deleterious impacts to the stream.

\* \* \* \*

On rebuttal, Jennifer Yocum, a feng shui consultant, testified that the Petitioner incorporated into the Plan several features Ms. Yocum proposed in order to improve the feng shui of the Funeral Home. Ms. Yocum testified that she did not believe the Funeral Home would adversely impact nearby residents from a feng shui perspective.

#### *The Board's Conclusions of Law*

In its July 3, 2013, Decision and Oder, the Board concluded that:

The Petitioner's Plan is in harmony with the land uses and policies indicated in Howard County's General Plan, PlanHoward 2030, for the RR-DEO zoning district. Funeral homes and mortuaries that satisfy the conditional use requirements of the Zoning Regulations are presumed to promote the general welfare of the community and the RR-DEO zoning district. Evidence was produced before the Board indicating that legislation had been proposed to remove the funeral home and mortuary conditional use from the RR-DEO zoning district. The Howard County Planning Board and DPZ, however, recommended against such removal, and the legislation was not enacted. These actions by agencies charged with planning responsibilities for the County confirm that funeral homes and mortuaries are important in the County's RR-DEO zoning district and are consistent with the policy goals of the General Plan.

#### *Contentions on Appeal*

Clarksville contends that the "Board's finding of harmony with the General Plan . . . is largely based on the fact that Funeral Homes are allowed in the RR zoning district."

More specifically, it asserts that the “adverse Cultural and Environmental impacts of the Funeral Home are in direct conflict with policies articulated in the General Plan.” They point out that the general plan “contains specific policy statements that contradict the Board’s finding of ‘harmony’” including its stated policies to “[e]ngage all members of the County’s socially and economically diverse community and highlight stewardship goals specific to the unique situations of each audience and community group;” and to “minimize the loss and degradation of environmental resources and restore[] where possible, the environmental quality that has been degraded by past actions.”

Therefore, Clarksville asserts, “the Board’s approval may not be affirmed with respect to the requirements of [HCZR] Section 131.B.1.” that require “harmony” with the Howard County general plan.

Donaldson responds that such plans “are merely guides in the zoning process,” and “[n]o Maryland court has ever required harmony with a master plan to become a Pandora’s Box for evaluating every subject matter addressed within the master plan.” Moreover, “the [Board] set forth numerous reasons as to why Donaldson’s conditional use plan was in harmony with the General Plan” including its satisfaction of the conditional use requirements and the failure of legislation “to remove the funeral home conditional use from the RR-DEO zoning district.”

The Board contends that it correctly determined that the proposed conditional use is in harmony with the general plan because “when a local legislature has determined through its comprehensive plan that a certain use is appropriate in a zone by way of

special exception (conditional uses in Howard County), the legislature has effectively declared that such uses, if they satisfy the specific requirements of the use, promote the health, safety and general welfare of the community.” It maintains that its decision was supported by the “substantial evidence” presented by Donaldson, and “[t]here was no credible evidence offered by the opposition to contradict this testimony.” In addition, in the Board’s view, cultural sensitivities are “not a ‘physical condition’ to be considered pursuant to HCZR 131.B.2.a.”

### *Analysis*

The Howard County general plan, PlanHoward 2030, provides for “Protecting & Enhancing Environmental Resources” and “[e]ngag[ing] all members of the County’s socially and economically diverse community and highlight[ing] stewardship goals specific to the unique situations of each audience and community group.” Regarding environmental protection, the general plan states that “[a] key to the overall environmental health of the County is development and redevelopment that minimizes the loss and degradation of environmental resources and restores, where possible, the environmental quality that has been degraded by past actions.” And, that “County regulations require undisturbed streamside buffer areas of 75 to 100 feet along perennial streams in residential zoning districts and 50 feet along intermittent streams in all zoning districts and along perennial streams in nonresidential zoning districts.” Regarding the engagement of Howard County’s diverse population, the plan suggests “targeted outreach to minority populations as well as multilingual outreach materials and approaches.”

The record does not demonstrate that Donaldson's conditional use proposal is not in harmony with the general plan. Donaldson complied with the Howard County stream buffer regulations mentioned in the plan as a method of "protecting" environmental resources. Mark Burchick testified as an expert "that the 100 foot stream buffer shown on the plan would be sufficient to prevent deleterious impacts to the stream," and Robert Vogel testified as an expert that "[s]o long as [Donaldson] complied with the imposed buffer, . . . the stream would not be adversely impacted." Although Clarksville's witnesses testified of "concerns regarding the potential environmental impacts" and asserted that "MDE could require a 150 foot buffer from the stream tributary running along the west side of the Property instead of the 100 foot buffer," the record supports a finding that Donaldson's proposal "minimizes the loss and degradation of environmental resources" in accordance with the plan.

In addition, the Board clearly reached out to and "[e]ngag[ed] all members of the County's socially and economically diverse community" over the course of the twenty-two hearings on the conditional use petition, as reflected by witnesses of Asian descent who testified regarding their concerns. The Decision and Order further acknowledged that even if the residents' cultural sensitivities were a "relevant consideration," funeral homes and mortuaries are "important in the County's RR-DEO zoning district," as evidenced by the County Council's decision to continue to permit that use. Based on the record, there is more than substantial evidence on which "reasoning minds could [have]

reasonably reach[ed] [the Board’s] conclusion,” that the proposed conditional use was in harmony with the general plan. *See Cremins*, 164 Md. App. at 438.

Section 131.N.22.e – Green Space

*The Relevant Provision*

e. At least 20% of the area within the building envelope shall be green space, not used for buildings, parking area or driveways. The building envelope is formed by the required structure setbacks from property lines and public street rights-of-way.

*The Board’s Relevant Findings of Fact*

Robert Vogel, a professional engineer, testified that greater than 20 percent of the area within the building envelope, formed by the structure setbacks from property lines and public street rights-of-way, would be green space not used for buildings, parking area, or driveways.

\* \* \* \*

Zachary Fisch, a professional engineer, testified in opposition to the petition. . . . Mr. Fisch further testified that he believed that the size of the Property, the size of the proposed parking areas, and the amount of green space provided were insufficient.

\* \* \* \*

On rebuttal . . . Mr. Vogel addressed Mr. Fisch’s contentions regarding the green space calculation, noting that DPZ agreed with Mr. Vogel’s use of the definition of “building envelope” as provided in Section 131.N.22.e of the Zoning Regulations.

*The Board’s Conclusions of Law*

Zoning Regulations Section 131.N.22.e requires that at least 20 percent of the area within the building envelope shall be green space, not used for buildings, parking area or driveways. That section also defines the term “building envelope,” providing that the building envelope is formed by the required structure setbacks from property lines and public street rights-of-way. Using this definition, 22.33 percent of the area within the building envelope will be green space, not used for buildings, parking area or driveways, in accordance with Zoning Regulations Section 131.N.22.e.

*Contentions on Appeal*

Clarksville asserts that, with respect to the green space requirement in the HCZR, the “Board repeats statutory criteria, gives lip service to extensive technical testimony, [and] offers a boilerplate conclusion.” In its view, the Board “ignores the dispute in the record as to which features of the site qualify as Green Space” and its “ruling on this issue is legally insufficient and may not be affirmed.”

In response, Donaldson contends that the Board’s conclusion that “22.33 percent of the building envelope would be green space . . . was based on substantial evidence, including [expert] testimony that the amount of green space provided was greater than 20 percent of the area within the building envelope, DPZ’s concurrence with [the witness’s] calculation, and [documentary evidence].” In Donaldson’s view, Clarksville’s witness did not offer testimony that contradicted its proffered calculation, but “offered an alternate and convoluted methodology” that “turned a blind-eye to the clear and unambiguous language of Sec. 131.N.22.e., by assert[ing] that the building envelope was formed by the building restriction lines . . . [not] the required structure setbacks,” as provided in Section 131.N.22.e.

The Board agreed with Donaldson’s position that “[t]he term ‘building envelope’ is specifically defined in the funeral home conditional use criteria” as being “formed by the required structure setbacks from Property lines and public street right-of-way.” In its view, “[h]ad the County Council intended for Section 131.N.22.e.’s green space building envelope to be formed by building restriction lines, they would have used ‘building

restriction lines.” The Board asserts that the definition of “building envelope” in the Subdivision Regulations differs from the definition in the HCZR and “applies only during the subdivision of residential lots.”

### *Analysis*

The relevant portion of the HCZR provides “[a]t least 20% of the area within the building envelope shall be green space, not used for buildings, parking area or driveways. The building envelope is formed by the required structure setbacks from property lines and public street rights-of-way.” HCZR § 131.N.22.e. In its September 24, 2012, Addendum to Technical Staff Report, the DPZ determined that Donaldson had met that requirement:

According to the Buildable Envelope Area tabulation, the building envelope comprises 64,159 square feet. On this basis, green space comprising 12,832 square feet (20 percent) of the building envelope is required and 14,329 (22.33 percent) is provided. . . . While it may be considered counter intuitive to include within a building envelope space which cannot be built upon, given that the purpose of identifying the building envelope is to serve as a basis for calculating a percentage of green space and not for the purpose of placing structures in an unbuildable area, counting the stream buffer as green space is consistent with the concept that the area is a permeable portion of the site.

The Board did not ignore “the dispute in the record as to which features of the site qualify as Green Space.” It considered the plain language of Section 131.N.22.e., and after weighing the TSR addendum and Donaldson’s expert testimony against the testimony of Clarksville’s experts, adopted the 22.33 percent calculation in its Decision and Order. That conclusion was supported by substantial evidence. *See Md.-Nat. Capital Park & Planning Comm’n v. Greater Baden-Aquasco Citizens Ass’n*, 412 Md. 73, 110 (2009)

(“It is not unreasonable for the Planning Board to rely on a Staff Report, as the Planning Board did in this case, if the Staff Report is thorough, well conceived, and contains adequate findings of fact.”).

Sections 133.D.7.b. and 131.B.2.c. – Parking

*The Relevant Provisions*

[b.] [Minimum Parking Requirements for] Funeral homes[:] 10.0 spaces per public viewing room, or 1 space per 50 square feet of floor area in public rooms (chapel, reception rooms, visitation rooms, and any flexible space adjacent to these rooms that can be used as overflow when necessary), whichever is greater, based upon a required floor plan of the proposed facility submitted with a Conditional Use petition or a Site Development Plan.

\* \* \* \*

[c.] The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

*The Board’s Relevant Findings of Fact*

According to Mr. Vogel, the Zoning Regulations require 98 parking spaces for the Funeral Home and the Plan Provides 98 spaces. Mr. Vogel testified that the parking areas are adequately sized, and that the parking areas, loading areas, driveways and refuse areas will be screened from public roads and residential uses.

\* \* \* \*

Mr. Donaldson believed that the Plan provided sufficient parking, and he testified that his other locations had never needed close to the number of parking spaces proposed for the Property.

\* \* \* \*

Zachary Fisch, a professional engineer, testified in opposition to the petition. . . . Mr. Fisch further testified that he believed that the size of the Property, the size of the proposed parking areas, and the amount of green space provided were insufficient.

\* \* \* \*

Cathy Stefano testified that she is a resident of Columbia, Maryland, and that she is opposed to the petition. Ms. Stefano testified that she had concerns regarding the potential traffic impacts of the Funeral Home, and she believed the number of parking spaces proposed may be inadequate for the use.

*The Board's Conclusions of Law*

Per Zoning Regulations Section 133.D.7.b, a funeral home requires the greater of 10 parking spaces per public viewing room or 1 parking space per 50 square feet of floor area in public rooms. Based on this requirement, the Funeral Home, with 4,876 square feet of floor area in public rooms, requires 98 parking spaces. The Plan provides 98 parking spaces. The Board concludes that the parking area will be of an adequate size for the proposed use.

*Contentions on Appeal*

With respect to parking, Clarksville asserts that the “Board fail[ed] to determine both the minimum required parking spaces for the Funeral Home, and the adequacy of the proposed parking with respect to the proposed location.” Therefore, the Board “may not be affirmed.”

Donaldson responds that the Board “concluded that the Funeral Home contained 4,876 square feet of floor area in public rooms and held that the corresponding proposed 98 spaces were sufficient.” The Board asserts that “the Funeral Home contained 4,876 square feet of floor area in public rooms[, and p]ursuant to Section 133 of the Zoning Regulations, that figure required that the Funeral Home provide 98 parking spaces,” which were provided.

*Analysis*

Section 133.D.7.b. requires funeral homes to have “the greater of 10 parking spaces per public viewing room or 1 parking space per 50 square feet of floor area in public rooms.” The 98 parking spaces that Donaldson provided complied with that regulation based on the amount of “public room” floor space. The number of required spaces, 124, proffered by Clarksville, however, was based on a calculation of “public room” floor space that included outdoor areas. The Board concluded that the number of parking spaces was sufficient, and substantial evidence in the record supports that decision.

**The *Schultz v. Pritts* “Adverse Effects” Test**

Cultural Adverse Effects

*Contentions*

Clarksville contends that given the “especially large Asian demographic” in the areas surrounding the proposed funeral home and mortuary, it will “have an atypically adverse, disruptive effect on the residential community because of its Asian residents’ strong cultural aversion to the death industry.” In support, Clarksville cites the testimony of several nearby residents who testified before the Board, including the testimony of Peter Li,<sup>13</sup> which relates a parable of Confucius and the perceived dangers of living near a funeral home.

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<sup>13</sup> We note that Peter Li, Ph. D., is a non-adjacent property owner living on Paper Place in Highland, Maryland who signed up to testify in opposition but (continued...)

Donaldson responds that the Board correctly “determined that cultural sensitivities were not physical conditions to be considered pursuant to HCZR Sec. 131.B.2.” and that “it would have been inappropriate to require Donaldson to prove that the Funeral Home would not offend a particular person or group of people who, for whatever reasons, claim a heightened aversion to funeral homes.” To the extent that there could be an objective standard addressing concerns as to, “whether the Funeral Home has adverse impacts on near[b]y residents above and beyond those ordinarily associated with such a use [it would have to be] from a feng shui perspective.”

The Board responds that it “concluded correctly that the cultural sensitivities testified to by [Clarksville] is not a ‘physical condition’ to be considered pursuant to HCZR, [131.A.]” and “it is impossible for Donaldson to prove that the Funeral Home will not offend a particular person or group of people.”

Clarksville replies that Donaldson’s suggestion that the adverse effects that the Court may consider are limited to the “boilerplate list” of physical conditions in the regulations is “absurd and must be rejected,” and that we “must also reject [Donaldson’s] alternative theory, . . . that the Board was permitted to consider cultural impacts, but only from a specific ‘feng shui’ perspective . . . .”

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was called by counsel for the opposition as an expert in geology. During his testimony, Dr. Li testified to feng shui principles and the cultural sensitivities of Asians.

*Analysis*

Petitioners applying for a conditional use in Howard County must demonstrate that “[t]he proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses.” HCZR § 131.B.2. This “adverse effects” standard has its roots in the seminal case of *Schulz v. Pritts*, 291 Md. 1, 15 (1981). In that case, Judge Davidson, writing for the court, explained that before granting or denying a petition for a special exception or conditional use, a reviewing body must determine “whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a [conditional] use irrespective of its location within the zone.” *Schultz*, 291 Md. at 15. A conditional use “must be denied when it is determined from the facts and circumstances that the grant of the requested special exception use *would result in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result* from the development of such a special exception use located anywhere within the zone.” *Id.* at 15 (emphasis added).

The “adverse effects” test does not require a petitioner to prove that the conditional use will have no adverse effects on the “vicinal” properties. Rather, “[t]he local legislature, when it determines to adopt or amend the text of a zoning ordinance with regard to designating various uses as allowed only by [conditional use] in various zones, considers in a generic sense that certain adverse effects, at least in type, potentially

associated with (inherent to, if you will) these uses are likely to occur wherever in the particular zone they may be located.” *Loyola*, 406 Md. at 106. Nor does the law require a petitioner “to compare, and concomitantly the zoning body to consider, the adverse effects of the proposed use at the proposed location to, at least, a reasonable selection or representative sampling of other sites within the same zone throughout the district or jurisdiction, taking into account the particular characteristics of the areas surrounding those other test sites.” *Id.* at 102.

In determining whether the inherent adverse effects of a particular use are above and beyond those associated with that particular use, a reviewing body does not need to “describe the evidentiary foundation for each of its findings, immediately following each finding.” *Critical Area Comm'n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 128 (2011). It is sufficient for a board to summarize the evidence supporting its conclusions in a section separate and apart from its conclusions. *See id.* at 134 (“[T]he Board explicitly summarized evidence presented by several witnesses supporting its conclusions, albeit in a separate section, enabling meaningful judicial review. That evidence, intellectually and logically, can be viewed only as bearing on what persuaded the Board to conclude as it did.”).

Clarksville takes issue with the Board’s Decision and Order because it “contains no determination or identification of the *ordinary or inherent adverse effects of a Funeral Home use* so as to facilitate application of the *Schultz v. Pritts* test and the language of Section 131.B.2.” (Emphasis in original). Donaldson responds that Clarksville is “merely

complaining that the analysis was not done in the precise manner they assert is required under [the case law, but t]he form over function espoused by [Clarksville] is incorrect” and has been rejected by the Court of Appeals.

In its Decision and Order, the Board concluded that

the cultural sensitivities testified to by various Protestants is not a ‘physical condition’ to be considered pursuant to Zoning Regulations Section 131.B.2.a[, and e]ven if it were a relevant consideration, the Board considered the totality of the evidence presented in this case and is not persuaded that the proposed use will create an adverse cultural impact on vicinal properties or that such impact will be above and beyond those ordinarily associated with funeral home and mortuary uses.

This Court has recognized that, generally speaking, funeral homes may have depressing effects on a broad spectrum of the population unrelated to any particular cultural background. The *Schultz* discussion of the issue in *Anderson v. Sawyer*, 23 Md. App. 612, 624-25 (1974), is instructive:

The presumption that the general welfare is promoted by allowing funeral homes in a residential use district, notwithstanding their inherent depressing effects, cannot be overcome unless there are strong and substantial existing facts or circumstances showing that the particularized proposed use has detrimental effects above and beyond the inherent ones ordinarily associated with such uses. Consequently, the bald allegation that a funeral home use is inherently psychologically depressing and adversely influences adjoining property values, as well as other evidence which confirms that generally accepted conclusion, is insufficient to overcome the presumption that such a use promotes the general welfare of a local community. Because there were neither facts nor valid reasons to support the conclusion that the grant of the requested special exception would adversely affect adjoining and surrounding properties in any way other than would result from the location of any funeral home in any residential zone, the evidence presented by the protestants was, in effect, no evidence at all.

The evidence considered by the Board included testimony from Asian protestants of the funeral home who discussed their cultural aversions to funeral homes. Opposition witness Marianne Lee discussed a potential adverse effect on property values, and other protestants discussed the depressing and morbid nature of funeral homes. During hearings before the Board, protestant Peter Li acknowledged that he was “aware” of an existing cemetery located directly across the street from the proposed site. Donaldson’s expert Robert Vogel testified “that persons of Asian descent [had] moved into new homes located in close proximity to two existing funeral homes on Old Columbia Pike in Ellicott City.”

The thrust of Clarksville’s argument is that the adverse effects of a funeral home at this location would be atypical because of the “large Asian demographic,” but the generalized allegations of the inherent depressing and culturally unsettling effects of funeral homes is not something that lends itself to objective evaluation as do such physical conditions as are provided for in Section 131.B.<sup>14</sup> The Board, after weighing the evidence, granted the conditional use. In doing so, it recognized the County Council’s decision to include “Funeral Home and Mortuary” as a permitted conditional use in rural residential districts. The Board was not persuaded that the number of Asian residents in

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<sup>14</sup> We note that in HCZR Section 131.B. considerations of adverse effects expressly include, but are not limited to, “noise, dust, fumes, odors, intensity of lighting, vibrations, hazards *or other physical conditions*,” “[t]he location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping;” and “adverse[] impact[] [to] environmentally sensitive areas.” (alteration and emphasis added). These are all criteria that can be objectively evaluated.

the area made the inherent adverse effect of a funeral home particularly atypical in this area. To the extent that the issue was fairly debatable, the Board found the opposition testimony to be “unsupported opinions and conclusions.” Substantial evidence in the record supports the Board’s conclusion.

### Environmental Adverse Effects

#### *Contentions*

Clarksville contends that “unique characteristics of the proposed Funeral Home location,” and its proximity to a “Tier II watershed, with an existing Tier II stream along the western edge of the site and . . . [a] naturally wooded riparian buffer” will lead to “extraordinary adverse effects.” According to Clarksville, the funeral home and mortuary will “cause a sufficient amount of pollution, loss of ground water discharge, other aquatic resource impacts, [and is] going to cause that resource to decline significantly in quality.”

Donaldson responds that the Board’s conclusion that “the Funeral Home would not have adverse environmental effects above and beyond those ordinarily associated with a funeral home and mortuary use” was supported by “substantial evidence in the record.” According to the Board, Donaldson’s witnesses testified regarding the stream buffer for the “unnamed tributary” of the Tier II stream, and indicated that “environmental site design practices and the 100 foot buffer [would] ensure that the stream will not be adversely affected in any way.”

Clarksville replies that “[n]either the Board nor [Donaldson] addresses the inescapable fact – established by the applicant’s own evidence – that 50 or more feet of

natural forest along a Tier II stream will be cleared pursuant to the approved Conditional Use Plan.”

*Analysis*

The conditional use regulations contain provisions for “minimiz[ing] the loss and degradation of environmental resources” in accordance with the general zoning plan, and require that any “proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.” HCZR § 131.B.2.

Regarding the alleged clearing of “50 or more feet of natural forest along a Tier II stream,” Donaldson’s expert Mark Burchick testified that this area is “not forested” because “[m]ost of the trees there are ornamental, not native trees, that were part of the previous homeowner’s landscape.” Regarding the alleged insufficiency of the stream buffer, Mr. Burchick testified that a one hundred foot buffer would be sufficient to prevent deleterious impacts. Opposition expert Mr. Klein testified that “increasing the buffer from the original 75 feet to 100 feet is a step in the right direction, [but] unfortunately it’s not adequate to comply with the portion of the subdivision regulations that require that special consideration be given to areas that have unique characteristics,” and opposition expert Mr. Redman testified that he believed the buffer should be 150 feet, but admitted that there was no codified 150 foot buffer requirement.”

In evaluating this factor, the Board concluded that:

Regarding environmental impacts, many witnesses for the Protestants expressed generalized fears concerning groundwater contamination and adverse impacts upon the stream to the west of the Property. [Donaldson’s] proffer of double walled pipes and a double walled tank with leak sensors,

for the embalming fluid drainage system, which shall be a condition of the Board's approval, will ensure that embalming fluids will not adversely affect vicinal properties. [Donaldson] has received an approved Percolation Certification Plan from the Health Department, and the size of the proposed septic system was designed based on actual water usage figures from existing, operating funeral homes. Furthermore, the Plan complies with all legally imposed stream buffer requirements. [Clarksville] presented no credible testimony that the stream buffer would be increased, or that adverse impacts would occur to the stream irrespective of [Donaldson's] adherence to the legally imposed buffer. [Donaldson's] witnesses, on the other hand, testified that the proposed use as shown on the Plan would not result in adverse impacts on the stream.

The issue was "fairly debatable," and the Board's decision was supported by substantial evidence in the record.

**JUDGMENT OF THE CIRCUIT COURT FOR  
HOWARD COUNTY AFFIRMED. COSTS TO BE  
PAID BY APPELLANT.**